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Maria A. Pallante
Register of Copyrights
U.S. Copyright Office
101 Independence Ave., SE
Washington, DC 20559-6000

Re: Orphan Works and Mass Digitization: Reply Comments to Notice of Inquiry (77 F.R. 204) (Docket No. 2012-12) and Responses

Dear Register Pallante:

The National Federation of the Blind (“NFB”) is the oldest and largest national organization of blind persons in the United States. It has affiliates in all 50 states as well as Washington, D.C. and Puerto Rico. The vast majority of its approximately 50,000 members are blind persons. The NFB is widely recognized by the public, Congress, executive agencies of government and the courts as a collective and representative voice on behalf of blind Americans and their families. The purpose of the NFB is to promote the general welfare of the blind by (1) assisting the blind in their efforts to integrate themselves into society on terms of equality and (2) removing barriers and changing social attitudes, stereotypes and mistaken beliefs that sighted and blind persons hold concerning the limitations created by blindness resulting in the denial of opportunity to blind persons in virtually every sphere of life. Among NFB’s principal missions are promoting the independence of the blind and equal access to technology for the blind. The NFB and many of its members have long been actively involved in promoting accessible technology for the blind, so that blind persons can live and work independently in today’s technology-dependent world.

INTRODUCTION

As the first round of comments in response to the Notice of Inquiry reveal, the issue of “orphan works” is more than a technical problem. It has serious consequences for the information consumers who are the ultimate, constitutionally-intended beneficiaries of the U.S. copyright system. The difficulties that face anyone seeking to ascertain accurately the current ownership of older copyrighted works, and to locate putative owners if their identities can be determined, places serious, often insuperable, barriers in the way of all citizen-consumers who

seek to make use of those works by publishing them, making them available online, incorporating them into new works, or otherwise. Those difficulties are compounded for the blind and print disabled, who may be unable to make ready use of even the limited tools that are now available to conduct searches for the heirs and assigns of long-dead authors, or the successors-in-interest to small businesses that were wound up decades ago.

Ultimately, as other commenters have pointed out, this is a social justice issue, in that its consequences are more severe for some population groups in American society than for others. See the comment (No. 53), submitted by Lateef Mtima, Howard University Law School, on behalf of the Institute for Intellectual Property and Social Justice. For those who struggle constantly to obtain levels of access to information that are at parity with those enjoyed by mainstream consumers, the special challenges that attend efforts to secure permission to make new uses of old works that have been abandoned, in effect if not in law, by their nominal owners, are frustrating. That is particularly so because the current technological environment opens a range of possibilities for all information users, however situated, the promise of which may be foreclosed, in practice, by the difficulty of tracing claims in orphan works.

Imagine, for example, the situation of a blind teacher/scholar who conceives the project of creating an anthology focusing on the representation of blindness in American print culture from the 1920s through World War II. Using the fully-accessible digital resources of a local university library, he or she has identified 20 thematically appropriate, previously published stories to include in the planned volume, along with an introductory essay and annotations. A few of these stories are by well-known writers, so that it may be possible to trace their successors and obtain permissions to use those stories in the collection. But the bulk of the authors are lost to history – obscure individuals whose work appeared in now-defunct small magazines or local newspapers, or was published in small editions by firms that were wound up long ago. Even for a sighted person, the next step – involving tracing the writers in question through local directories, genealogical and probate records, state corporation filings, etc., would be daunting. For the blind anthologist, it is likely to be impossible, given the inaccessible character of these print research materials (and many others like them).

BACKGROUND

The orphan works crisis is of our own making, but it is a crisis nonetheless. Over the last 35 years, the United States has modified its copyright laws – not once but repeatedly – in ways that significantly implicate the access that information consumers can expect to enjoy to the cultural productions of past generations: by extending the effective duration of copyright and enhancing the potential penalties for all kinds of copyright infringement. These changes have been undertaken, perhaps appropriately, to serve the interests of corporations and individuals who own a small subset of all copyrighted works – those that have enduring commercial appeal and are especially vulnerable to competitive misappropriation. These benefits for a small

number of owners have been achieved, however, at the cost of a large number of actual or potential creative, scholarly, and academic users, including those represented by NFB.

Contemporary developments in copyright law may have the effect of mitigating significantly the impact of the orphan works crisis on some users. As demonstrated by the comment (No. 21) submitted David Hansen on behalf of the Berkeley Digital Library Project, many creative and scholarly users of orphan works could plausibly rely on the evolving fair use doctrine. This justification for unlicensed use of content may also be available to institutions that engage in mass digitization of collections that include orphaned material. Moreover, the contemporary rules relating to injunctions in intellectual property cases, as laid down by the U.S. Supreme Court in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), make it unlikely that courts would actually “shut down” otherwise worthwhile educational, scholarly or archival projects merely because they incorporate unlicensed content from orphan works. Nevertheless, both individual and institutional users are understandably risk-averse, and they share a particular concern: that their good-faith use of orphan works in a creative, scholarly or archival project could be the occasion for the award of significant money damages against them. The effect, as many of the commenters demonstrate, is a significant chill on precisely the sort of new cultural production that the U.S. copyright law was designed to promote.

One set of the sets of changes that have brought this situation about is well-known: modifications in the formula by which the term of copyright is calculated. In 1977, the copyright in most works came to an end 28 years after they had been published, and the exceptions to this rule had a relatively fresh data trail, thanks to the operation of the renewal system. Today, the default assumption is that any work published after 1922 or created after 1977 is copyrighted, and the renewal status of many pre-1978 works is unascertainable from public records. Copyright registration records are not routinely updated to reflect changes in ownership or address, and the system for the recordation of transfers maintained by the Copyright Office is often disregarded in business practice. In sum, the volume of works that may be protected by copyright has increased geometrically, while the usefulness of public records to ascertain copyright status or ownership actually has declined.

As already noted, even where a copyright registration exists for an older work, it may be an effective dead end rather than the starting point for a fruitful search. Indeed, the other set of recent changes in U.S. law, mentioned above, tend to exacerbate the problem. Since 1978, there have been a number of adjustments to the rules governing the calculation of the “statutory damages” available to successful copyright plaintiffs who can demonstrate that a registered work has been infringed – even when no actual damages can be proven. The upper limits of such awards now are set at \$150,000 per work, which (however unlikely such an award may be) operates as a substantial deterrent on would-be users of orphan works – especially when the possibility of additional discretionary award of attorney’s fees is made part of the calculation. As a result, blind and print-disabled information users face increasing costs of entry, without any obvious policy justification. The search costs that the orphan works problem generate for them

and other users, along with the opportunity costs of valuable project forgone, do not translate directly into obvious benefits to anyone. In effect, the orphan works problem imposes a form of deadweight loss on the entire copyright system.

SOLUTIONS

The NFB strongly supports free market mechanisms that are effective in clearing rights between willing sellers and willing buyers of information resources. The current situation, however, is a classic example of market failure; the search costs that a willing buyer would incur to locate an unknown and unforthcoming seller exceed the value of the project itself. In such circumstances, some curative government action is required. Whatever the solution, accessible technology should have a role to play in it. On the other hand, the imposition of significant, additional unnecessary burdens on would-be good-faith users should not.

NFB would support the following steps, some of which are within the purview of the Copyright Office itself, to mitigate the current orphan works crisis:

- By regulation, the Copyright Office could undertake measures to allow easy and inexpensive on-line “change of address” filings to update existing registration documents.
- Also by regulation, the Copyright Office could take parallel measures to reinvigorate and publicize the advantages of the system for recordation of transfers, and to make online facilities available for such recordation.
- By legislation, the Congress could require current updating of registration documents and the recordation of relevant transfers as preconditions for the availability of statutory damages and attorney’s fees, as well as permanent injunctive relief, to prevailing plaintiffs.
- Also by legislation, Congress could limit the availability of injunctive relief against users who unsuccessfully consulted the online records maintained by the Copyright Office a good-faith attempt to license the use of a work created before a stated date. *See the comment (No. 32) submitted by the Glushko-Samuelson Intellectual Property Clinic, American University Law School, on behalf of the Dance Heritage Coalition.*

By contrast, NFB opposes any suggestion that the solution to the orphan works crisis lies in the creation of a European-style “extended collective licensing” (ECL) system. *See the comment (No. 20) submitted by Paul Aiken on behalf the Authors Guild, Inc.* Such an approach would, in effect, address the current condition of market failure by creating an artificial licensing market for orphan works, based on the legal fiction that an organization or organizations represent the interests of unknown or unlocatable authors who have effectively abandoned their works. In practice, of course, such authors are unlikely to claim the fees collected. Thus such a

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system would benefit primarily whatever organization or organizations are designated to receive and hold the fees in question, and (ultimately) to make alternative use of these funds.

ECL is outside the part of the U.S. tradition of collective administration: Collective Administration Organizations such as ASCAP, BMI, and the Copyright Clearance Center, for example, can issue licenses only on behalf of those firms and individuals that have chosen to be represented by them. NFB understands that even in Europe, the real utility of ECL as an approach to dealing with orphan works is largely untested. In the U.S. context, moreover, the sovereign right of the author to choose how to dispose or otherwise deal with his or her rights is a fundamental tenet of copyright law, as reflected in our cautious and partial embrace of European-style moral rights. ECL for orphan works is especially inappropriate here because it is based on a false presumption that all unaccounted-for authors would, if consulted, wish to enforce their rights against users who seek to reissue, collect, or add value to them. This may not be true of a small fraction of professional authors, but it is palpably false where most “amateur,” academic and scholarly authors are concerned. See Jennifer Urban, Pamela Samuelson and David Hansen, Brief of Amici Curiae Academic Authors in Support of Defendant-Appellant and Reversal (in *Authors Guild, Inc. v. Google, Inc.*), November 16, 2012, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2177032 (Academic authors desire broad public access to their works).

In addition, NFB stresses that any measures to address the orphan works crisis that involve either creating new on-line information resources, or requiring would-be users of orphan works to consult such resources, or both, must incorporate clear directives that the resources in question be fully accessible to the blind and print disabled. With respect to new information tools, NFB notes that when a decision to make on-line content accessible in the design stage of a project, it is both straightforward and relatively inexpensive to implement. See Association of Research Libraries, Report of the ARL Joint Task Force on Services to Patrons with Print Disabilities, November 2, 2012, at <http://www.arl.org/bm~doc/print-disabilities-tfreport02nov12.pdf>.

Any technicalities that keep the blind and print disabled from equal access to information and participation serve as additional argument in favor of an open and flexible approach.

Sincerely,



Mehgan Sidhu
General Counsel